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No. 03-836

Supreme Court, U.S.
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In The Supreme Court of the United States

COLORADO,

Petitioner,

v.

WADE MILLER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF OF COLORADO DISTRICT ATTORNEYS' COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF COLORADO DISTRICT ATTORNEYS' COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the Colorado District Attorneys' Council ("CDAC").[1] Petitioner and Respondent have consented to CDAC's filing of this brief. The correspondence reflecting consent has been filed in the office of the Clerk.

I. INTEREST OF THE *AMICUS CURIAE*

The Colorado District Attorneys' Council ("CDAC") is comprised of the offices of the elected district attorneys who serve in the twenty-two judicial districts in Colorado. CDAC's mission is to promote, foster and encourage an effective administration of criminal justice in Colorado. To that end CDAC provides centralized prosecution-related services to the district attorneys of the state including, among other things, training, legislative drafting and

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[1] No counsel for either party authored this brief in whole or in part. No person or entity, other than CDAC, made a monetary contribution to this brief's preparation or submission. *See* Sup. Ct. R. 37.6. The Eleventh Judicial District Attorney is counsel for Petitioner, and the Office of the Eleventh Judicial District Attorney is a member of CDAC. CDAC is funded primarily through assessments paid by the member offices. However, neither the Eleventh Judicial District Attorney nor his office has made any financial contribution to this brief's preparation or submission. The two other counsel on the brief for Petitioner, including counsel of record, are Assistant Attorneys General and are appointed as Special Deputies District Attorney regarding this matter. The Colorado Attorney General is not a member of CDAC, although his office does pay an annual assessment to CDAC primarily to cover the expenses of access to CDAC's statewide computer system. Neither the Attorney General nor his office has made any financial contribution to this brief's preparation or submission.

liaison, legal research, and management assistance. CDAC frequently represents the interests of its members and the people of Colorado as *amicus curiae* in the Colorado courts.

CDAC's members are charged with the duty of prosecuting state criminal offenses throughout Colorado. CDAC possesses and provides the statewide perspective of the entire prosecution community, and its members have a direct interest concerning the severe negative impact the decision below, *People v. Miller*, 75 P.3d 1108 (Colo. 2003), reproduced at Pet. App. a1-a31, will have on the truth-finding process in criminal trials and therefore on effective law enforcement, public safety and the public's respect for the law and administration of justice. CDAC submits this brief to illuminate both the manner and extent of the Colorado Supreme Court's faulty articulation and misapplication of the good faith exception to the exclusionary rule, and to argue that certiorari review is needed to alleviate the severe negative impact that court's error in federal constitutional law will have on the administration of criminal justice.

The petition presents two questions, the first concerning the Colorado Supreme Court's treatment of the staleness doctrine under the Fourth Amendment, and the second concerning that court's treatment of the good faith exception to the exclusionary rule. CDAC fully supports the Petitioner and its position with regard to the first question presented, and urges that certiorari review is needed as to that question for all the reasons set forth in the petition, but perceives no need to bring additional matter relevant thereto to this Court's attention. *See* Sup. Ct. R. 37.1. Accordingly, *amicus curiae* CDAC offers its assistance to this Court through treatment of the good faith exception question only.

II. SUMMARY OF THE ARGUMENT

The exclusionary rule is designed to safeguard significant Fourth Amendment interests from the dangers of unrestrained police actions. On the other hand, the "substantial social costs" of the exclusionary rule on the truth-seeking process – and therefore on protecting the public, imposing appropriate sanctions, and maintaining respect for the law and the administration of justice – are likewise significant. *United States v. Leon*, 468 U.S. 897, 906-07 (1984). This Court has struck the balance between these conflicting interests by restricting the exclusion of evidence "to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 908.

This Court concluded that the exclusionary rule was unlikely to result in appreciable deterrence – and therefore it should not apply – when law enforcement officers obtain evidence "in objectively reasonable reliance on a subsequently invalidated search warrant." *Leon*, 468 U.S. at 922. This case involves the question of when an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Leon*, 468 U.S. at 923, which was one of the four circumstances identified in *Leon* in which "the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*

The Court should grant the writ because the Colorado Supreme Court has interpreted this language in a manner that all but eliminates the good faith exception itself. It has done so based on the dissent in *Leon*, rather than on the majority opinion and the cases relied on by the majority. It has inexplicably found official belief in the existence of probable cause to be entirely unreasonable despite the

fact that three dissenting colleagues on the court found that there was probable cause. In addition, this Court should grant the writ to clarify the meaning of this limitation on good faith and thereby alleviate difficulties frequently faced by lower courts.

If the opinion below is allowed to stand, the federal good faith exception will rarely apply in Colorado and in other jurisdictions persuaded to follow Colorado's lead. That would have the result that the substantial social costs of the exclusionary rule will be incurred despite the absence of any remedial, deterrent effect.

III. ARGUMENT

A. The Colorado Supreme Court Has, In Effect, Nullified the Good Faith Exception to the Exclusionary Rule.

The great extent to which the Colorado Supreme Court departs from established U.S. Supreme Court doctrine is apparent from a comparison of the underlying assumption of the Colorado court's good faith analysis with that of *Leon*. The opinion below states, "In the vast majority of cases where a substantial basis for determining probable cause does not exist, the police cannot rely on the good faith exception." (Pet. App. a14.) In contrast, this Court repeatedly indicated in *Leon* that it will usually be the case that the exclusionary rule will not apply to searches authorized by warrants later found to have been issued based upon insufficient affidavits.

The *Leon* opinion states, "[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those *unusual cases* in which exclusion will further the purposes of the exclusionary rule."

Leon, 468 U.S. at 918 (emphasis added). It goes on to state that searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate *normally* suffices to establish that a law enforcement officer has acted in good faith in conducting the search. *Id.* at 922 (emphasis added). This Court said, "Our conclusion is that the [exclusionary] rule's purposes will *only rarely* be served by applying it" where "officers have relied on a subsequently invalidated search warrant." *Id.* at 926 (emphasis added).

The Colorado Supreme Court's decision not to apply the good faith exception in the "vast majority" of cases in which a warrant is ultimately found to have been issued without a substantial basis for probable cause[2] is a dramatic

[2] The Colorado court began its application of the good faith exception by referring to "cases where a substantial basis for determining probable cause does not exist." (Pet. App. a14.) It had earlier acknowledged that a "reviewing court should uphold the validity of a warrant if the affidavit accompanying the warrant creates a substantial basis for the conclusion that probable cause existed." (Pet. App. a6.) However, rather than applying this deferential standard, the court agreed with the trial court's conclusion that the warrant was not supported by probable cause. (Pet. App. a2, a3, a4, a14.) Therefore, both reviewing courts improperly based their suppression orders on their *de novo* determinations that the affidavit did not establish probable cause rather than determining whether there was a substantial basis for the issuing magistrate's conclusion that there was probable cause. *Cf. Illinois v. Gates*, 462 U.S. 213, 236 (1983). In addition, the court concluded that the officers could not have reasonably relied on the warrant because reasonable officers should know that there cannot be probable cause without relatively current information of illegal activity or the presence of contraband. (Pet. App. a16.) Thus, despite any language suggesting the contrary, the Colorado court's good faith analysis is in fact premised on a *de novo* determination of a lack of probable cause, as if that were the same as a determination that there was not a substantial basis for finding probable cause.

turn away from the good faith doctrine established in *Leon*.

B. The Colorado Court Developed Its Begrudging Approach to the Good Faith Exception By Inappropriately Relying on the *Leon* Dissent.

The *Miller* court quoted its prior decision in *People v. Leftwich* for its premise that good faith would not apply in the "vast majority" of cases in which a substantial basis for determining probable cause does not exist. (Pet. App. a14.) In *Leftwich*, the court relied on a dissent in *Leon* as the basis for this premise. *People v. Leftwich*, 869 P.2d 1260, 1270-71 n.12 (Colo.), *cert. dismissed*, 512 U.S. 1271 (1994) (quoting *Leon*, 468 U.S. at 958-59 (Brennan J., dissenting)).

The Colorado court relied on a portion of Justice Brennan's dissent where he severely criticized the majority decision in light of *Illinois v. Gates*, 462 U.S. 213 (1983) (in which Justice Brennan also dissented). The Colorado court quoted Justice Brennan's statement that "[b]ecause the two standards overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we would have to entertain the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant." *Leftwich*, 869 P.2d at 1270 n.12, quoting *Leon*, 468 U.S. at 958-59 (Brennan J., dissenting).

It is not suprising that the Colorado court's reliance on the *Leon* dissent led to an approach to the good faith exception that is diametrically opposed to the decision of

this Court's majority. The Colorado court has concluded that the good faith exception will rarely apply in precisely those situations for which it was designed. It has gutted the good faith exception recognized by this Court's majority based on a criticism of that holding in the dissent. The conflict between this Court and the Colorado court could not be more substantial.

C. This Limitation on Good Faith Applies to Flagrant Situations and Is Not To Be the Norm.

The *Leon* Court relied on *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J. concurring in part) for the qualification on the good faith exception implicated in this case. *Leon*, 468 U.S. at 923. Justice Powell's analysis in *Brown* reveals that he meant this language to apply to "flagrant" Fourth Amendment violations.

Justice Powell recognized that "[a]ll Fourth Amendment violations are, by constitutional definition, 'unreasonable,'" but suppression of evidence will not serve "the deterrent purposes of the exclusionary rule" for all such violations. *Brown*, 422 U.S. at 609. He referred to when factors relied upon to make an arrest are "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" as the example at the extreme – the "flagrantly abusive violation of Fourth Amendment rights" where "the deterrent value of the exclusionary rule is most likely to be effective." *Brown*, 422 U.S. at 610-11. He contrasted that situation, at one extreme end of the spectrum, with those "'technical' violations of Fourth Amendment rights" at the opposite end of the spectrum "where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated or

pursuant to a statute that subsequently is declared unconstitutional." *Brown*, 422 U.S. at 610-11.

In *Brown,* officers broke into an apartment of an acquaintance of a murder victim, searched it, and arrested that person at gunpoint when he returned home, all in the absence of probable cause and for the purpose of questioning him as part of their homicide investigation. *Brown*, 422 U.S. at 592. Those facts and Justice Powell's explanation of his use of the language at issue here show that that language was limited to "flagrant" Fourth Amendment violations, that is, where the officers' actions were "so obviously inconsistent with what is right or proper as to appear to be a flouting of law. . . . " *See* Merriam-Webster's Collegiate Dictionary 441 (10th Ed. 2002).

The Colorado court was wrong to conclude that Justice Powell's language from *Brown,* as applied in *Leon*, encompassed "the vast majority of cases" in which a warrant is sought and approved, but later found to be factually deficient. All such mistaken judgments about probable cause may be unreasonable for constitutional purposes, but they are not flagrant constitutional violations, for which the exclusionary rule can be expected to have a deterrent effect. Justice Powell recognized as much in *Brown* and this Court did too in *Leon,* but the Colorado court did not in *Miller.*

D. The Colorado Court Misconstrued This Court's Concept of "Bare Bones" Affidavits to Support Its Severe Limitations on the Good Faith Exception.

The Colorado court appropriately linked the limitation on good faith involved here with "bare bones" affidavits.

(Pet. App. a10.) However, the court applied this phrase strangely, saying, "The affidavit in this case is a 'bare bones' affidavit regarding the existence of the crucial link between the place to be searched and current information." (Pet. App. a15.) Thus, the Colorado court uses "bare bones" to describe an affidavit later found to be insufficient in establishing any link ultimately deemed crucial in the calculation of probable cause.

The examples of "bare bones" affidavits in the decisions of this Court give a much different and more limited meaning to "bare bones" than that applied by the Colorado court. Those cases establish that "bare bones," like Justice Powell's language in *Brown*, refers to extreme examples of affidavits that are flagrantly deficient in factual support for the warrant. It is the obvious nature of the deficiency of an affidavit, and not merely an error about its sufficiency, that provides the basis for charging the officer with knowledge that the warrant should not be requested, and for expecting that suppression of the evidence will serve its deterrent purpose.

This Court had in earlier cases used "bare bones" as a label for affidavits that present only untestable conclusory statements, such that a magistrate cannot make an independent determination of probable cause and issuance of a warrant could constitute nothing but a mere ratification of the bare conclusions of others. Then in *Leon* the Court looked to those earlier cases when discussing "bare bones" affidavits, as it also had done in *Gates*. *Leon,* 468 U.S. at 915 (citing *Aguilar v. Texas*, 378 U.S. 108, 114-15 (1964), *Giordenello v. United States*, 357 U.S. 480 (1958), and *Nathanson v. United States*, 290 U.S. 41 (1933)); *id.* at 923 n.24 (referring to *Whiteley v. Warden*, 401 U.S. 560 (1971) as involving a "bare bones" affidavit). *See Gates*,

462 U.S. at 239 (also citing *Nathanson* and *Aguilar).* The meaning of "bare bones" is thus to be found in the facts of those earlier cases.

The affidavit in *Nathanson* contained only "[a] sworn statement of an affiant that 'he has cause to suspect and does believe' that" contraband was on the premises.[3] *Gates*, 462 U.S. at 239; *Nathanson*, 290 U.S. at 44. The affidavit in *Aguilar* stated only that "[a]ffiants have received reliable information from a credible person and do believe" that drugs were stored in a home.[4] *Gates*, 462 U.S. at 239 (alteration in original); *Aguilar*, 378 U.S. at 109. The sworn complaint in *Giordenello* stated only that "Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation. . . ."[5]

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[3] The full basis for the warrant in *Nathanson* was: "Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave." *Nathanson*, 290 U.S. at 44.

[4] The full basis for the warrant in *Aguilar* was: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Aguilar*, 378 U.S. at 109. The dissent said that the information supporting the warrant also included that the officers "kept the premises of petitioner under surveillance for about a week." *Aguilar*, 378 U.S. at 116 (Clark, J. dissenting).

[5] The full basis for the warrant in *Giordenello* was: "The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas,

(Continued on following page)

Giordenello, 357 U.S. at 481. The sworn complaint in *Whiteley* only stated that the named "defendants did then and there unlawfully break and enter a locked and sealed building."[6] *Whiteley*, 401 U.S. at 563.

As these cases demonstrate, this Court has consistently used "bare bones" to describe documents supporting the warrant that stated only bare conclusions of the officer or the informant, without providing any facts from which the magistrate could make an independent determination of probable cause. In contrast, the Colorado Supreme Court perceives only bare bones once it has declined to draw a particular intermediate conclusion from the totality of the facts in the affidavit – in this case, that the evidence of criminal activity is sufficiently current. It does so even where the affidavit contains much more than just the officer's bare conclusion on the existence of probable cause.[7]

Veto Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code." *Giordenello*, 357 U.S. at 481 (alteration in original).

[6] The full basis for the warrant in *Whiteley* was: "I, C.W. Ogburn, do solemnly swear that on or about the 23rd day of November, A.D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whiteley and Jack Daley, defendants did then and there unlawfully break and enter a locked and sealed building [describing the location and ownership of the building]." *Whiteley*, 401 U.S. at 563 (alteration in original).

[7] The affidavit here contained three and a half single-spaced, typed pages implicating the defendant and his home in the manufacture of methamphetamine. (Pet. App. a18, Justice Coats, dissenting; Pet. App. a25-a31.)

As shown by the cases this Court cited in *Leon*, the limitation on good faith implicated here should be confined to extremely deficient affidavits, such as those "bare bones" ones where the officer presents only the conclusion that there is probable cause with no supporting facts. Such circumstances establish why the reasonably well-trained officer should have known that he should not rely on the warrant and why suppression of the evidence should serve to deter. The Colorado court has failed to recognize what this Court meant by "bare bones" and therefore has failed to properly restrict this limitation on good faith to flagrant situations where the exclusionary rule will serve its deterrent purpose.

E. The Reasonable Analysis of the *Miller* Dissent Supports the Good Faith of the Officer.

The Colorado court also failed to accommodate in its approach the fact that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *Leon*, 468 U.S. at 914. This Court stated that "the opinions of the divided panel of the Court of Appeals" made it clear that the affidavit in *Leon* itself "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause," thereby supporting the objective reasonableness of the officer's belief in the existence of probable cause. *Leon*, 468 U.S. at 926.

The fact that reasonable minds can differ over probable cause is perhaps most apparent in a case like this one, in which only a bare majority of the state supreme court found the affidavit deficient and three justices found that same affidavit to be sufficient. It is, at best, perverse

to find the police officers "could not have harbored an objectively reasonable belief in the existence of probable cause," *id.*, or that official belief in the existence of probable cause is "entirely unreasonable," *id.* at 923, where a well-reasoned dissent of three supreme court justices demonstrates that there is a reasonable basis for believing in the existence of probable cause.

The court below did not explain why the dissent did not provide a basis for concluding that the officer was objectively reasonable in believing the warrant to be valid. It did say, however, that objective good faith is considered as of the time police apply for the warrant, so that "the fact that a magistrate acted favorably upon a warrant request is of no moment in the determination of whether the officer acted with objective reasonableness." (Pet. App. a9, citing *Malley v. Briggs*, 475 U.S. 335, 345 (1986)). Perhaps from this the court assumed that the well-reasoned dissent did not matter because it came after the officer applied for the warrant. Such a reliance on *Briggs* would be misplaced.

Briggs involved a question of immunity for a civil claim that was based on an arrest under a warrant where the charges were subsequently dropped when the grand jury did not return an indictment. *Id.* at 338-39. This Court held that the fact that a judge approved the warrant did not control whether the officer was immune, construing *Leon's* standard in this context to be equivalent to "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Briggs*, 475 U.S. at 345-46.

This standard does not preclude consideration of a subsequently written appellate opinion of dissenting justices, or even of arguments subsequently considered as reasonable but rejected as less persuasive, in determining the objective reasonableness of the application for a warrant. A belief in the existence of probable cause cannot be "entirely unreasonable" on an objective basis, *Leon*, 468 at 923, if there are reasonable arguments that can be made in support of its existence. Likewise, an officer could not "know" that an affidavit does not establish probable cause, *Briggs*, 475 U.S. at 345-46, when the considered review of that affidavit by the state's high court leads to such a split on that precise question.

Court-ordered suppression of reliable evidence through faulting a law enforcement officer as harboring an entirely unreasonable belief when there is demonstrable, even published, legal support for that belief, is particularly likely to engender that disrespect for the law and for the administration of justice which the *Leon* Court sought to avoid by creating the good faith exception. *Leon*, 468 U.S. at 908. The Colorado court erred seriously in failing to acknowledge that a difference of opinion within its own ranks on the sufficiency of the affidavit is substantial, perhaps controlling, support for the objective reasonableness of the officer's belief in the validity of the warrant.

F. The Application of the Limitation on Good Faith Considered in this Case Is in Need of Clarification by this Court.

In the 19 years since *Leon* was decided, lower courts have frequently been confronted with the question presented here of when the good faith exception to the exclusionary rule is not applicable because a warrant is based

on "an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'" under *Leon*, 468 U.S. at 923. *See* 1 Wayne R. LaFave, *SEARCH AND SEIZURE, A Treatise on the Fourth Amendment,* § 1.3(f) at 84 (3rd Ed. 1996) (describing this question as "a most difficult issue" that "continues to be frequently litigated").

This exception to good faith cries out for further clarification because, as this case shows, its application can be very problematic. As the Court said in *Gates*, "There are so many variables in the probable cause equation that one determination will seldom be a useful 'precedent' for another." *Gates*, 462 U.S. at 238 n.11. As a result, even very well-trained officers will not necessarily know when there are sufficient "indicia of probable cause." Furthermore, the Court also recognized that "[r]easonable minds frequently may differ on the question of whether a particular affidavit establishes probable cause." *Leon*, 468 U.S. at 914. Even high court justices can disagree, as they did in this case, on whether there is a substantial basis for a determination of probable cause.

Under the Colorado approach, neither of these facts matter, because if a reviewing court ultimately concludes, even by a closely divided vote, that the magistrate was wrong in the determination of probable cause, the officer will be deemed unreasonable in "the vast majority of cases," so that good faith does not apply. Objective reasonableness in this context cannot depend so on *post facto* majority rule without severely changing the meaning of "reasonable."

The problem presented is how to recognize those affidavits where the "indicia of probable cause" are so lacking that the officer can be charged with knowing that the warrant should not be requested, comparable to the other, more obvious limitations on good faith. These other limitations are: when the officer misleads the magistrate, as in *Franks v. Delaware*, 438 U.S. 154 (1978); when the magistrate wholly abandons the neutral and detached judicial role, as in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); and when the officer is responsible for a warrant that is facially deficient, in contrast to *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). *Leon*, 468 U.S. at 923. It is not comparable to these situations to be wrong about whether evidence of drug manufacturing at a particular place has become stale for Fourth Amendment purposes.

The Colorado Supreme Court's decision in *Miller* provides an opportunity to correct Colorado's significant departure from established good faith doctrine and at the same time to provide greatly needed clarification of this important issue of Fourth Amendment doctrine.

IV. CONCLUSION

This Court should grant the writ in order to attend to the substantial departure by the Colorado Supreme Court from Fourth Amendment doctrine and to provide guidance to Colorado and to other jurisdictions on how to determine when an affidavit is "so lacking in indicia of probable

cause as to render official belief in its existence entirely unreasonable."

Respectfully submitted,

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